ORDER NO. 03-269

ENTERED APR 30 2003

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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In the Matter of	)	
	)	
METRO ONE TELECOMMUNICATIONS,	)	
INC.	)	ORDER
	)	
Petition for Enforcement of an Interconnection	)	
Agreement with QWEST CORPORATION	)	
(formerly known as U S WEST	)	
COMMUNICATIONS, INC.).	)	

DISPOSITION: REFUND DETERMINED

Metro One Telecommunications (Metro One) initiated this proceeding, with the Public Utility Commission of Oregon (Commission), seeking enforcement of an agreement—arbitrated in docket ARB 100—with Qwest Corporation (Qwest). We already have determined that Qwest violated the agreement by failing to provide directory assistance listings (DAL).[1] In this order, we determine the amount of damages Qwest must pay to compensate Metro One.

On December 20, 2002, Michael Grant, an Administrative Law Judge with the Commission, held a hearing in Salem, Oregon. Commissioner Joan Smith attended. John Stephens, attorney, appeared on behalf of Metro One. Jay Nusbaum, attorney, appeared on behalf of Qwest.

Based on the record in this proceeding, we enter the following:

FINDINGS

Metro One provides directory assistance service to end-users of wireline and wireless telecommunications carriers. To provide this assistance, Metro One uses a variety of databases. These databases include both DAL and subscriber listing information. DAL provide names, addresses, and phone numbers for landline telephone

[1] Order No. 00-623.

customers and are updated on a daily basis. Subscriber listing information also provides names, addresses, and telephone numbers of landline customers, but is less accurate than a DAL database because it is not updated as frequently and does not contain nonlisted or nonpublished subscribers.

In 1995, Metro One entered an agreement with U S WEST Marketing Resources Group (U S WEST MRG) to receive subscriber listing information for customers of Qwest, a local exchange carrier that operates in 14 western states. US WEST MRG is a subsidiary of Qwest.

Metro One subsequently sought access to Qwest's DAL at cost-based rates pursuant to the 1996 Telecommunications Act. After an arbitration proceeding, the Commission approved an agreement between Metro One and Qwest on September 20, 1999.[2] The agreement provided Metro One with access to Qwest's DAL database at a cost below the price Metro One was currently paying U S WEST MRG for subscriber listing information. Qwest failed to honor the agreement and Metro One commenced this enforcement action.

On February 1, 2000, Metro One began receiving DAL for Qwest's service territory from a third party. At this time, Metro One stopped receiving updates from U S WEST MRG, but continued to use the previously received subscriber listing information through May 31, 2000.

In October 2000, we found that Qwest had breached the interconnection agreement.[3] Shortly thereafter, Metro One again requested the DAL and asked Qwest to provide them in three installments divided by service region. Qwest provided listings for the state of Washington on October 28, 2000, and supplied the remainder of the western region listings on November 14, 2000. Also on November 14, 2000, Qwest provided listings for the eastern region, and, on November 21, 2000, supplied listings for the central region. With these delivery dates and the number of states included in each delivery, Metro One had all the listings for an average of 15 days in November.

Once Metro One began receiving DAL from Qwest, it began converting the data for use in its system and verifying the accuracy of the listings. During this period, Metro One continued to receive the alternative DAL from the third party through March 31, 2001.

[2] *See* Order No. 99-544.
[3] *See* Order No. 00-623.

Metro One's contracts with the three providers of directory assistance information had varying terms. Under its contract with U S WEST MRG, Metro One paid for an initial load of listings, weekly updates, and a usage fee. From September 20, 1999 to May 31, 2000, Metro One paid U S WEST MRG a total of $2,620 for updates and $339,116 for usage. During 1999, Metro One received an average of 449,282 updates each month.

A description of Metro One's agreement with the third party, including amounts paid under that agreement, is contained in confidential Appendix A.

Under the arbitrated agreement with Qwest, Metro One paid for an initial load of listings, daily updates, and an output charge. It did not pay Qwest a usage fee. From December 2000 to March 31, 2001, Metro One received an average of 1,205,679 updates each month and paid Qwest a total of $81,368.

During this proceeding, Metro One discovered that it had overpaid U S WEST MRG for updates. U S WEST MRG was supposed to charge $0.0002 per listing but, instead, charged a flat fee of $25 per tape. Had U S WEST MRG properly billed for the updates, Metro One would have paid only $347 for updates, rather than $2,620.

DISCUSSION

Determining damages for Qwest's breach of the arbitrated agreement requires a three-step analysis. First, we must determine how much Metro One was required to pay alternative providers for directory listing information. This involves an examination of how much Metro One was required to pay both U S WEST MRG for the subscriber listing information and the third party for the alternative DAL.

Second, we must determine how much Metro One would have paid Qwest during this time period if Qwest had immediately complied with the arbitrated agreement. This figure will be subtracted from Metro One's payments to determine the damages caused by Qwest's failure to provide the listings.

Finally, we must determine whether Metro One is entitled to pre-judgment interest, and if so, decide on the applicable period and rate for the award.

1. Payments to Alternate Providers

a. U S WEST MRG

There is no dispute that, during the relevant period, Metro One paid a total of $341,736 to U S WEST MRG. Metro One contends that the Commission should use this full amount in determining damages. Qwest contends that the figure should be reduced by $2,273 to exclude the amount that Metro One unwittingly overpaid for updates.

Commission Resolution

We previously concluded that Metro One is entitled to a refund of the difference in the amounts it was required to pay third parties and what it should have paid Qwest. Under its contract with U S WEST MRG, Metro One was required to pay only $347 for updates. Because the additional $2,273 payment was attributable to Metro One's negligence, the overpayment should not be included in Metro One's refund request. Rather, the overpayment should be resolved between Metro One and U S WEST MRG.

The fact that U S WEST MRG is a subsidiary of Qwest does not alter our conclusion. U S WEST MRG is a non-regulated subsidiary and not a party to this proceeding. Moreover, there is no evidence that Qwest played any role in the unintentional overcharge and resulting overpayment.

b. Third Party

Metro One contends that it is entitled to damages for all payments to the third party from February 1, 2000 to March 31, 2001. Although Qwest began providing DAL in late October 2000, Metro One contends it had to convert the data for use in its system and verify the accuracy of the listings. Consequently, Metro One contends it is entitled to recover damages for this overlapping transition period.

Qwest opposes any damage award for the time period after it began performing under the contract. Because the refund is intended to remedy the breach of the arbitrated agreement, Qwest contends that any claim for damages after Qwest began providing DAL in October 2000 is beyond the scope of this proceeding. At most, Qwest contends that Metro One's claim should be cut-off in mid-November 2000. Based on an analysis of the DAL delivery dates and the number of states included in each delivery, Qwest claims that Metro One had all the listings for an average of 15.1 days in November 2000.

Commission Resolution

We acknowledge Metro One's need to convert and verify Qwest's data. That need, however, arose from Metro One's internal business requirements, not Qwest's breach of the arbitrated agreement. Indeed, Metro One admits that it would have gone through a conversion and verification process even if Qwest had begun providing DAL on September 20, 1999. Because there is no causal link between Qwest's breach and the amounts Metro One continued to pay to the third party, we conclude that Metro One's claim for damages should terminate as of November 15, 2000.[4] When a contract is breached, the injured party is entitled to be placed in the same position as if there had been no breach; it is not entitled to more.[5]

We dismiss Metro One's argument that additional time was needed to process the new data because Qwest delivered the DAL in "piecemeal" fashion and not in accordance with the agreement. In a letter dated October 11, 2000, Metro One expressly requested that the delivery be made in installments:

> Metro One requests the initial 14 state database loads, at the rates specified in the Interconnection Agreement, in three (3) increments: October 27, 2000 (Western area), November 3, 2000 (Eastern area), and November 10, 2000 (Central area), with updates beginning the following Monday in each case.[6]

We acknowledge that Qwest was late in ultimately providing the installments; however, the November 15 cut-off date for damages compensates Metro One for those delays.

We also reject Metro One's contention that Section 251(b)(3) of the 1996 Telecommunications Act, which requires Qwest to provide nondiscriminatory access to directory listings, entitled Metro One to additional time to convert Qwest's data. As Qwest notes, Section 251(b)(3) governs the provision of services at market-based rates, not cost-based rates. Moreover, Qwest provided the listings in an industry standard format that is used by most Regional Bell Operating Companies. [7]

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[4] We also agree with Qwest's adjustment for November 2000. To account for the fact that Metro One had all the listings for half of that month, Qwest properly made a 50 percent adjustment to the amounts paid to the third party, as well as a 50 percent adjustment to the estimated costs under the arbitrated agreement (discussed below).

[5] *See, e.g., Timberline Equip. v. St. Paul Fire and Marine Ins*., 281 Or 638 (1978); *Stubblefield v. Montgomery Ward & Co*., 163 Or 432 (1940).

[6] Metro One Exhibit 102/Johnson 89.

[7] In an attempt to justify the testing period, Metro One raised for the first time in its rebuttal testimony an allegation that Qwest failed to provide adequate technical support after it began performing under the Agreement. At hearing, the Administrative Law Judge ruled that Metro One's claim regarding technical support was a new claim outside the scope of this proceeding and excluded any evidence about the alleged lack of technical support. We agree and adopt the ALJ's ruling.

2. Costs under the Arbitrated Agreement

Because charges under the arbitrated agreement are based on the number of DAL updates, we must determine how many updates Metro One would have received absent Qwest's failure to perform. Metro One contends the Commission should derive estimates based on the number of updates it received under its agreement with U S WEST MRG. From September 20, 1999 to February 1, 2000, Metro One imputes the number of updates it actually received from U S WEST MRG during that period. For the remaining period, Metro One imputes a monthly average of updates it received from U S WEST MRG for the entire year of 1999. For both time frames, Metro One increases the number of updates by 20 percent to account for the fact that the U S WEST MRG updates did not contain nonlisted or nonpublished numbers.[8]

Qwest contends that Metro One's methodology is flawed because it derives estimates from performance under the U S WEST MRG rather than actual performance data under the arbitrated agreement. Qwest points out that the record contains evidence of the number of updates Metro One received from Qwest under the agreement from December 2000 through March 2001. Qwest claims that this actual performance data should be used to estimate the number of updates under the arbitrated agreement, because the data is more reliable than estimates taken from a different agreement. Moreover, Qwest adds that this actual data illustrates the flaw of Metro One's methodology. While Metro One estimated the number of updates it would have received to be 539,138 per month, the monthly average of updates actually provided by Qwest under the agreement was more than twice that amount – 1,205,678.

Commission Resolution

Of the two proposed methodologies, we find Qwest's more persuasive and adopt it. The performance data represents the number of updates that Metro One reported it actually received from Qwest under the arbitrated agreement from December 2000 through March 2001. Metro One does not dispute the accuracy of the figures, nor does it contend that the four-month period is atypical or otherwise uncharacteristic of what its experience would have been for the period in question. Indeed, Metro One admits that it could have used the actual performance data for its calculations. Accordingly, we conclude that the performance data provides the most reliable estimate of Metro One's costs under the arbitration agreement.

[8] Using data received from the alternative third party provider for July 2002, Metro One calculated that 17 percent of Qwest's DAL were nonlisted or nonpublished numbers.

We are less persuaded by Metro One's proposed use of updates received from U S WEST MRG. The U S WEST MRG contract and the arbitrated agreement involve different sellers, different products, and different terms. While Metro One has attempted to adjust the U S WEST MRG updates to account for these differences, it has failed to explain the large discrepancy between the estimated figures and the actual performance data. In the absence of any explanation why the estimates are less than half of actual numbers, there is no basis to conclude that the U S WEST MRG updates are a suitable surrogate for updates under the arbitration agreement.

In reaching this decision, we reject Metro One's assertions that Qwest "manipulated" the U S WEST MRG estimates using actual performance data to "adjust for nonlisted and nonpublished numbers."[9] Contrary to Metro One's assertions, Qwest did not adjust Metro One's estimates based on the U S WEST MRG contract, but rather simply reports the number of updates it provided under the arbitrated agreement from December 2000 through March 2001. We also dismiss Metro One's claim that an adverse inference should be drawn against Qwest because it failed to produce the precise number of updates it would have provided under the agreement for the period in question. While we agree that this information would have been the best evidence to calculate Metro One's costs, there is no evidence that Qwest has the ability to produce this information. Moreover, even assuming Qwest has this ability, there is nothing to indicate that Metro One sought production of the information, or that Qwest improperly suppressed it. For these reasons, Metro One's reliance on *State v. Paquin*, 229 Or 555 (1962) and other cases is misplaced.[10]

3. Pre-judgment Interest

Metro One seeks pre-judgment interest on all damages and proposes two interest rates. As a first alternative, Metro One proposes a rate of 10.2 percent, which is equal to Qwest's authorized return on equity. Citing *re Pacific Northwest Bell Tel., Co.*, Order No. 87-406, Metro One contends that this rate is appropriate since, given Qwest's breach, Metro One was an unwilling investor in the utility and should earn no less than investors voluntarily purchasing the company's stock. As a second alternative, Metro One proposes the 9 percent statutory rate provided in ORS 82.010. Under each alternative, Metro One seeks simple, not compound, interest.

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[9] Metro One Opening Br. 8:19, 15:24, 18:3.

[10] In *State v. Paquin*, 229 Or 555 (1962), the Supreme Court, quoting Wigmore on Evidence, stated:

> "It has always been understood—the inference indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit."

Qwest asserts that Metro One is not entitled to prejudgment interest for four reasons. First, Qwest contends that Metro One's request is outside the scope of this proceeding because the Commission did not include prejudgment interest as part of the damage award to Metro One. Second, Qwest contends that there is no contractual or statutory provision that permits an award of prejudgment interest. Third, Qwest contends that prejudgment interest is not proper because Metro One's damages are not fixed and certain. Finally, Qwest contends that it would be inequitable to award interest because Metro One delayed the resolution of this case.

Commission Resolution

Generally, when a party breaches a contract by failing to pay a sum of money, courts often include an award of prejudgment interest as part of general damages. The theory is that the injured party should be compensated for the loss of the use of money from the time of the breach until judgment. Courts also award prejudgment interest to remedy the failure to render a performance if the amount of damages is readily ascertainable.

In Oregon, the general rule is that prejudgment interest cannot be recovered unless there is a contractual agreement between the parties to pay interest or a statute imposing interest.[11] The facts demonstrating the foundation for interest must be pled and proved by the requesting party.[12]

Turning to the matter before us, we find that Metro One's request for prejudgment interest is a proper part of this proceeding. Because Metro One suffered monetary damages as a result of Qwest's breach of the agreement, we concluded that Metro One is entitled to damages equal to the difference in the amount it was forced to pay a third party provider and the amount it would have paid Qwest under the arbitrated agreement. While our prior order did not expressly specify that interest was included as part of the award, the inclusion of interest is an inherent part of our attempt to fully compensate Metro One for Qwest's misconduct.

We also find that Metro One has established the legal basis for an award of prejudgment interest. Although the arbitrated agreement contains no provision for the payment of interest, ORS 82.010 provides a statutory foundation for the recovery of prejudgment interest. This statute imposes an implied contractual obligation to pay interest on "[a]ll monies after they become due[.]"[13] Moreover, Metro One's damages are readily ascertainable. Contrary to Qwest's assertions, prejudgment interest is

[11] *See, e.g., Newell v. Weston*, 150 Or App 562 (1997), *rev den* 327 Or 317 (1998).
[12] *See, e.g., Laursen v. Morris*, 103 Or App 538 (1990), *rev den* 311 Or 150 (1991).
[13] ORS 82.010(1)(a); *See, Dowling v. Albany Planing Mill*, 238 Or 425 (1964).

available even when the parties dispute the amount of damages on which prejudgment interest is to be awarded.[14] As Metro One notes, this case involves an ascertainable monetary loss, an ascertainable date on which the loss began, and an ascertainable period during which the loss continued. The fact that this Commission is required to ascertain these matters does not preclude an award of prejudgment interest.[15]

We dismiss Qwest's argument that an award of interest is a penalty because Metro One delayed this proceeding. We acknowledge that the resolution of this case has been delayed, and that some of this delay was caused by Metro One's delay in providing a refund estimate, its desire to protect confidential portions of its agreement with a third party, and its requests to reschedule certain procedural events. There is no evidence, however, that Metro One took any action to intentionally or inappropriately postpone this matter. Moreover, much of the delay was caused by Qwest's challenges to Metro One's right to obtain DAL under the arbitrated agreement. While Qwest had the right to raise and litigate these issues, it cannot now rely on the consequence of its actions to argue against an award of interest.

Furthermore, the award of interest is not a penalty.[16] Rather, it arises from Qwest's failure to perform under the arbitrated agreement. Qwest's refusal to perform under the arbitrated agreement caused Metro One to spend additional money to obtain alternative products. To compensate Metro One for the deprivation of its use of this money, Qwest should pay interest from the time that performance was due.

Accordingly, we conclude that Metro One is entitled to prejudgment interest on the monthly amounts Qwest owes from when performance was due under the arbitrated agreement. We further conclude that the statutory rate of 9 percent simple interest should apply. We agree with Qwest, however, that any interest calculations should be based on the fact that the agreement allows Metro One 30 days after receipt of Qwest's invoice to make payments.[17]

CONCLUSION

Based on the decisions set forth in this order, we conclude that, due to its failure to perform under the arbitrated agreement, Qwest must pay Metro One a total of $322,314 in damages, which includes simple interest at a rate of 9 percent per annum through March 31, 2003. Our calculations of these damages are contained in the spreadsheet attached as confidential Appendix B. Qwest shall pay the award within 30 days from the date of this order. Post-judgment interest, at the rate of 9 percent, shall continue to run on the award until paid.

[14] *See, e.g., Strader v. Grange Mutual Insurance Co.*, 179 Or App 329 (2002).
[15] *See, Hazelwood Water Dist. v. First Union Management*, 78 Or App 226 (1986).
[16] *See, e.g., Haret v. State Accident Insurance Fund*, 72 Or App 668 (1985).
[17] *See* Qwest Post-Hearing Reply Br. at 16-17.

ORDER

IT IS ORDERED that Qwest shall pay Metro One $322,314 in damages for its failure to perform under the arbitrated agreement. Qwest shall pay the award within 30 days from the date of this order.

Made, entered, and effective _____.

_____	_____
Roy Hemmingway	**Lee Beyer**
Chairman	Commissioner
	_____
	Joan H. Smith
	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

CONFIDENTIAL APPENDICES A & B ARE AVAILABLE PURSUANT TO THE TERMS OF THE PROTECTIVE ORDER ISSUED IN THIS PROCEEDING.